

APPEAL NO. 021983
FILED SEPTEMBER 12, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 10, 2002. The hearing officer resolved the disputed issues by deciding that the claimed injury did not occur while the respondent (claimant) was in a state of intoxication and that the claimant has disability from January 24, 2002, through the date of the CCH. The appellant (carrier) appeals, arguing that the hearing officer's determinations are against the overwhelming weight and preponderance of the evidence. The claimant, through her attorney and on her own behalf, responds, urging affirmance.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant was not intoxicated at the time of the injury or that she had disability. An employee is presumed sober at the time of an injury. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. However, a carrier rebuts the presumption of sobriety if it presents "probative evidence" of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. March v. Victoria Lloyds Insurance Co, 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ dismissed). Once the carrier has rebutted the presumption, the employee has the burden of proving he or she was not intoxicated at the time of the injury. *Id.*

The carrier argues on appeal that the hearing officer incorrectly placed the burden of proof on it to establish that the claimant was intoxicated. We find that the hearing officer properly applied the applicable burden of proof. The hearing officer noted in the Statement of Evidence that the records relied upon by the forensic toxicologist were not admitted into evidence, that no other lab reports or results were in evidence, and that he was not persuaded that the report of the toxicologist in evidence was sufficient to shift the burden to the claimant to prove that she was not intoxicated. It was undisputed that the drug test was taken approximately thirty-three hours after the injury. The hearing officer then further briefly analyzed the facts as though the burden had shifted to the claimant and determined that there was no other evidence that the claimant was intoxicated. The claimant testified at the CCH that she drove both to and from work, that she was able to interact with other employees during her shift, and the claimant underwent an exit interview with two of her supervisors prior to leaving the employer's premises.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ.

App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate-reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We are satisfied that the evidence sufficiently supports the hearing officer's decision in favor of the claimant on the intoxication issue and, consequently, the carrier is not relieved from liability for the compensable injury.

Disability is likewise a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. "Disability" is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Under the facts of this case, we perceive no error in the hearing officer's resolution of the disability issue.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Michael B. McShane
Appeals Judge